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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

NO. 734

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Appellants

v.

AMERICAN SHEET & TIN PLATE COMPANY, ALLEGHENY STEEL COMPANY and PITTSBURGH PLATE GLASS COMPANY, ET AL.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR APPELLEES.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Pittsburgh, Pa.,

Counsel for Appellee, American Sheet & Tin Plate Company.

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Chicago, Ill.,

Counsel for Appellees, Allegheny Steel Company, Pittsburgh Plate Glass Company, Weirton Steel Company, West Leechburg Steel Company.

Of Counsel:
WILLIAM W. COLLIN, JR.,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 208-212 GRANT STREET, PITTSBURGH, PA.

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Appeal from the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR APPELLEES.

OPINION DELIVERED IN THE COURT BELOW.

The opinion delivered by the specially constituted statutory Court below will be found reported in American Sheet & Tin Plate Co. v. United States, and five other cases (consolidated for hearing), 15 Fed. Supp. 711.

COUNTER STATEMENT OF THE CASE.

We do not regard Appellants' statement of the facts of the case as accurate nor complete. The essential facts may best be stated in the words of the Findings of Fact of the Court below, as follows:

> "1. The plaintiffs all operate manufacturing plants which are located in the vicinity of Pittsburgh, Pennsylvania, with the exception of the Pittsburgh Plate Glass Company, which, in addition to a plant in the Pittsburgh District at Ford City, Pennsylvania, also operates a plant at Crystal City, Mo. The plants of the other plaintiffs are located respectively as follows. American Sheet & Tin Plate Company, Vandergrift and Scottdale, Pennsylvania, and Wellsville, Ohio; The Allegheny Steel Company at Brackenridge, Pennsylvania; The Weirton Steel Company at Weirton, West Virginia; and the West Leechburg Steel Company at Leechburg, Pennsylvania. All of these plants are served by the Pennsylvania Railroad Company, a common carrier engaged in interstate commerce, except the plant of the Pittsburgh Plate Glass Company located at Crystal City, Missouri, which is served by the Missouri Pacific Railroad Company and the St. Louis-San Francisco Railway Company, common carriers engaged in interstate commerce."
>
> "2. At each of plaintiffs' plants, terminal switching is performed in connection with the receipt and delivery of freight under the provisions of duly filed and published railroad tariffs, which provide that the industry will perform the terminal switching service for account of the railroad company and that the industry will be allowed for such service, out of the current freight rates, the actual

cost for service performed but not exceeding specified amounts per car."*

"3. By long continued custom and practice of both carriers and shippers such terminal switching service, namely, the placement of cars in position accessible to consignors and consignees respectively for loading and unloading, is part of the transportation service which the carriers are obliged to perform under the compensation afforded by the published freight rates."

"4. The carriers have not provided in their published tariffs any separately established charges for such terminal switching services to be exacted in addition to the published freight rates."

"5. That in each of the present cases the terminal switching service performed is covered by the railroads' published tariffs, and is a part of the line-haul freight charge, and where the plaintiffs have been engaged by the railroad companies to do this 'spotting service' themselves, they are entitled to the allowances provided for in the published freight tariffs."

"6. In the present cases, none of the industries has refused to permit the railroad to enter upon the industrial tracks; the physical condition and layout of the industrial tracks will accommodate the locomotive power of the carriers without hazard or excessive delay; and the industries receiving the allowances do not occupy large areas with many scattered plants, connected with an intricate sys-

* While an allowance to Weirton Steel Company has been published and in effect for some years, it has never been paid and the railroad itself has been doing the spotting work.

tem of industrial tracks and used chiefly as industrial facilities."

"7. In the present cases there was no substantial evidence to support a conclusion that the so-called interchange tracks at any of these industries are points where the cars would be either accessible or convenient for loading by the consignor or unloading by the consignee."

"8. There was no evidence of record before the Commission tending to show that the allowance in any of these cases was excessive."

"9. In none of the present cases was there any finding of the Commission that the allowance is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, nor was there any substantial evidence on which the Commission could have based such findings."

The Appellants assign error as to each of the above findings, and the broad issues covered by them are thus squarely presented in these appeals.

The detailed facts with relation to the several plants of Appellees here involved, and the spotting service performed by the carriers serving them, will be found at the following pages of the Record, respectively:

Name of Plant	*Pages of Record*
American Sheet & Tin Plate Co.	R. 231-243
Allegheny Steel Company	R. 199-204
Pittsburgh Plate Glass Co. (Ford City, Pa., plant and Crystal City, Mo., plant),	R. 214-231
Weirton Steel Company,	R. 209-214
West Leechburg Steel Company,	R. 204-208

It must be borne in mind that the only service intended by the term "spotting", as used in these cases, is a single movement from the point of interchange to a definite point for loading and unloading each car. The Appellants' brief implies, although it does not so state, that we are concerned with interior movements of plant traffic to and from various parts of the establishment. The Appellees have at no time claimed that such movements would be the duty of the carrier, nor do the allowances cover them. The only interruption shown in the single movement which is called "spotting" is for weighing the car and its contents for billing purposes to the mutual benefit of both carrier and shipper.

SUMMARY OF ARGUMENT.

Railroads are the private property of their owners and are free to manage their business affairs provided they do not give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced. The Commission's functions are limited in scope by the Acts of Congress.

The placement of cars at reasonably convenient and accessible places for loading and unloading within industrial plants, including those of Appellees, is a common carrier service to which shippers are entitled and which the carriers are in duty bound to perform. This spotting service is a transportation service under the Interstate Commerce Act. The existing rate structure has been erected on the assumption that the carrier is obligated to perform such service. The established custom and practice is evident from the prior views of the Commission and the undisputed testimony of the witnesses in the present cases. The carrier is obligated to furnish the transportation service included in

the rate, and if the spotting service was not included therein, the carrier's tariffs were required to so specify.

Certain extraordinary circumstances, not present in these cases, may relieve or limit the obligation of the carriers to perform the spotting service.

The carriers may at their election either perform the spotting service themselves or they could lawfully employ Appellees to perform the spotting service on the carrier's behalf and pay reasonable compensation therefor.

An allowance to a shipper when provided in a published tariff of a carrier cannot be construed as a rebate or to violate Section 6 of the Interstate Commerce Act.

To support a cease and desist order by the Commission it must make the necessary quasi jurisdictional findings of fact that the rate or practice complained of was unreasonable, unjustly preferential and unduly discriminatory or otherwise unlawful or the order is void. No such findings were made in these cases.

The decision of the Court below should be affirmed.

ARGUMENT.

I.

The Relative Status of the Carriers and the Commission.

It is apparent that in the transportation of freight by railroad someone must provide facilities for the receipt and delivery of the property transported. There must be a place of loading and unloading, and the car must be transported to and from that place by someone. This placement or so-called "spotting service" is indispensable, and the decisive question here is—Do the carriers undertake to perform it at appellees' plants as a part of the transportation service included in the line-haul rates?

In spite of the vastness of the record that has raised this issue, it is in reality a simple one. In approaching its solution it is important that we should bear in mind the relative status of the carriers and the Interstate Commerce Commission.

The Commission is not possessed of general managerial powers over carriers, but its functions are limited in their scope to those particular circumstances in which Congress has vested it with supervisory jurisdiction. In the words of Mr. Justice Brewer: "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager." *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108, 118; 52 L. Ed. 705, 712 (1908). See also *Interstate Commerce Commission v. Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, 41; 77 L. Ed. 588, 604

(1933). "Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits." *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission,* 162 U. S. 184, 197; 40 L. Ed. 935, 939 (1896).

The well settled practice of the Pennsylvania Railroad and other carriers in the area here involved of treating the terminal or spotting service as included in the transportation furnished under the published station to station rates was adopted and carried out in the exercise of this contractual freedom which all carriers enjoy, and such practice may not be abolished by a cease and desist order of the Commission, as was attempted in these cases, unless the requisite jurisdiction is found in the Interstate Commerce Act and unless any quasi-jurisdictional findings upon which the Commission's authority is founded are fulfilled.

II.

The Placement of Cars at Reasonably Convenient and Accessible Places for Loading or Unloading Within Industrial Plants, Including Those of Appellees, Is a Common Carrier Service to Which Shippers Are Entitled, and Which the Carriers Are in Duty Bound to Perform, and Is a Transportation Service Under the Interstate Commerce Act. Certain Extraordinary Circumstances, Not Present in These Cases, May Relieve or Limit This Obligation (Conclusion of Law No. 1 of the Court Below (R. 573)).

A. THE SPOTTING SERVICE IS A TRANSPORTATION SERVICE UNDER THE INTERSTATE COMMERCE ACT.

The spotting service falls clearly within the domain of railroad transportation as contemplated by Congress.

Section 1, paragraph (3), of the Interstate Commerce Act, defines "transportation" as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, *and all services in connection with the* receipt, *delivery,* elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling *of property transported.*" (Italics ours)

This Court has frequently recognized that the transportation service as thus defined in the Interstate Commerce Act includes delivery and embraces the performance of spotting service within an industrial plant:

Interstate Commerce Commission v. Atchison, T. & S. F. Ry. Co., 234 U. S. 294, 308-312; 58 L. Ed. 1319, 1327 (1914).

Chesapeake & Ohio Ry. Co. v. Westinghouse, Church, Kerr & Co., 270 U. S. 260, 265; 70 L. Ed. 576, 578 (1926).

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 198; 79 L. Ed. 1382, 1388 (1935) (Live Stock)

That the Act extends to all terminal facilities and instrumentalities, and that transportation does not cease at the interchange track is clearly pointed out by this Court in the case of *United States v. Union Stock Yard & Transit Company*, 226 U. S. 286, 57 L. Ed. 226, 233 (1912), where Mr. Justice Day said:

> "Together, these companies, as to freight which is being carried in interstate commerce, *engage in transportation* within the meaning of the act, *and perform services as a railroad* when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. * * * In *Union Stock Yards Co. v. United States*, 94 C. C. A. 626, 169 Fed. 404, Mr. Justice Van Devanter (while a circuit judge) speaking for the court of appeals, said (406):
>
> " 'Its (the Stock Yards Company's) operations * * * include the maintenance and use of railroad tracks and locomotives, the employment of a corps

of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. *The carriage of these shipments from the transfer track to the sheds or pens, and vice versa, is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route.* True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point.' " (Italics ours)

B. THE EXISTING RATE STRUCTURE HAS BEEN ERECTED ON THE ASSUMPTION THAT THE CARRIER IS OBLIGATED TO PERFORM THE SPOTTING SERVICE.

It is astonishing to find Appellants stating in their brief (page 31) that "it has never been, and is not now, general railroad custom and practice to treat the 'spotting' service here involved as included in the transportation obligation under the line-haul rate." This Court itself, in the *Los Angeles Switching Case,* 234 U. S. 294; 58 L. ed. 1319 (1914), calls attention to the findings of the Commission: "That a spur track delivery is a substitute service and not supplemental to any other delivery (page 308 U. S.; 1326 L. ed.); *that carriers throughout the country customarily 'so treat industry's spurs of the kind here in question'",* the only exception being, apparently, the cities of Los Angeles, San Francisco and San Diego. Furthermore, the Commission itself in *Car Spotting Charges,* 34 I. C. C. 609, states:

> "It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line-haul rate."

The original report of the Interstate Commerce Commission concludes that the spotting service is not included in the rate, that the carriers are in consequence not compensated for performing it, and therefore are not obligated to perform it and may not grant allowances in lieu of its performance. The congenital defect of the reports is that no such proposition is possible under the law and the uncontradicted testimony of carriers and shippers alike.

The Importance of Custom and Practice.

The difficulty with the premise on which the Commission proceeds is that it comes after more than forty years of railroad practice and custom to the contrary, according to the undisputed evidence relating to the area east of the Mississippi and north of the Potomac and Ohio.* Ordinarily custom and practice present a question of fact to be determined from the record alone, but when, as here, the custom and practice has been established for such a time as to be expressed and recognized in the decisions of courts and *quasi* judicial bodies, the question is removed from the realm of fact alone, and becomes, at least in part, a matter of law.

The importance of custom and practice in defining the extent of transportation service is indicated in

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*The New England carriers have not adopted the practice of paying allowances for spotting, but quite generally perform the spotting services requested by their industries. (R. 250)

Adams v. Mills, 286 U. S. 397, 409; 76 L. ed. 1184, 1193 (1932). Mr. Justice Brandeis said:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U. S. 285, 294, 66 L. ed. 943, 947, 42 S. Ct. 477. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto. If there was evidence to sustain the Commission's findings on these matters, its conclusion that the collection of the extra charge from the shippers was an unreasonable and unlawful practice must be sustained."

Atchison, Topeka & Santa Fe Ry. Company v. United States, 295 U. S. 193, 200; 79 L. ed. 1382, 1389 (1935) is to the same effect. The opinion of Mr. Justice Butler states:

> "Long continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier. *Adams v. Mills, supra* (286 U. S. 410, 76 L. ed. 1184, 1193, 52 S. Ct. 589). So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yards Company's properties for this service from mere egress such as is included in transportation of live-stock to destinations other than public yards."

PRIOR VIEWS OF THE COMMISSION.

Prior decisions of the Commission are of particular importance here because of the fact that it has exercised supervision over the rate structure for fifty years. If it can be demonstrated that the Commission has consistently taken the position that the spotting service is included, it must follow that the rate structure has been erected on that basis. The prior views of the Commission cannot be the subject of serious dispute. They are established by decisions almost without number. It will suffice to refer to a few of them.

The most important decision of the Commission on the question is that rendered in *Car Spotting Charges*, 34 I. C. C. 609 (1915), quoted in full in the Appendix to this brief. It is difficult to single out for quotation parts of the decision, for the case covers every question raised in the report here under review, and is opposed to the present report in every particular. The facts which brought the case before the Commission are important. In that case the carriers east of the Mississippi River and north of the Ohio and Potomac Rivers had filed tariff schedules directly responsive to a suggestion which had come from the Commission itself in the *Industrial Railway Cases*, 29 I. C. C. 213 (1914.) These tariffs provided for the imposition of specific spotting charges at the several hundred named industries. In other words, the carriers in 1913 proposed a scheme of charges to apply at all industries having systems of plant tracks when there were interchange tracks on which the cars were first deposited by the carrier for subsequent movement to places of loading and unloading. The decision of the Commission was not hastily made. It was the result of a long investigation and careful consideration of all applicable principles and the recognition of the

compelling requirements of the decisions of this Court in *The Tap Line Cases,* 234 U. S. 1, 58 L. ed. 1185 (1914), and the *Los Angeles Switching Case,* 234 U. S. 294, 58 L. ed. 1319 (1914). There is no doubt under the express language of that decision of the Commission that the service is included in the American rate structure east of the Mississippi and north of the Ohio and Potomac, and that the mere size or complexity of the industry is not controlling. We quote from the decision, 34 I. C. C. 609, at page 616 (Appendix, p. 63):

> "It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line-haul rate, and in the *Los Angeles case,* 18 I. C. C. 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. *Los Angeles case,* 234 U. S. 294. *The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries.*

> "As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, *without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary.*" (Italics ours)

The *Car Spotting Charges Case* was not the first time the question had been before the Commission. In *Associated Jobbers of Los Angeles v. A. T. & S. F. Ry. Company,* 18 I. C. C. 310, 314 (1910), the Commission said:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery."

Commissioner Lane, in the course of the majority opinion, remarked further at page 316 of the decision:

> "The refinement of the English method of stating rates has not appealed to the mind of the American railroad man, for the same reason, perhaps, that American hotel keepers do not make a separate charge to their guests for lights or soap."

Since the *Car Spotting Charges Case,* the decisions of the Commission have consistently followed the doctrine there established.

Transportation rates on various commodities have been fixed by the Commission in numerous cases without the imposition of additional charges for spotting

services*, which, as a matter of practice, were being performed by or at the expense of the carriers. Outstanding among these cases for present purposes is *Iron and Steel Articles,* 155 I. C. C. 517, 562; 161 I. C. C. 386; 161 I. C. C. 608, where the Commission, following an exhaustive investigation, made a "thorough revision" of the rates on iron and steel articles (the business in which Appellees' plants are engaged) in eastern territory. Clearly, the line-haul rates prescribed in that decision were not intended for application only to and from the interchange tracks of the iron and steel plants. (See testimony of Bihler, R. 491.) There is not even a suggestion of such limited application in the Commission's Report. Likewise, in the case of *Coke Between Points in Central and Illinois Territories,* 194 I. C. C. 640 (1930), and *Coal, Bituminous, Ex River, etc.,* 197 I. C. C. 617 (1933), both of which commodities are consumed in very large quantities at the plants of Appellees, the Commission prescribed scale rates without mention of any spotting charge, and without restriction of the application of such rates to and from plant interchange tracks. See to the same effect:

Industrial Sand Cases, 1930, 188 I. C. C. 99 (1932).

Consolidated Stone Cases, 200 I. C. C. 65 (1934).

General Petroleum Investigation, 171 I. C. C. 286 (1931).

Eastern Class Rate Investigation, 164 I. C. C. 314 (1930).

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* The only exception is the Iron Ore Rate Cases, 41 I. C. C. 181, wherein special reference was made to exemption of the terminal placement services from the established rate. See p. 219 of that decision. No similar expression or action is found in any other rate decision of the Commission.

Cement in Trunk Line Territory, 174 I. C. C. 224 (1929).

Pennsylvania Sand & Gravel Producers Asso. v. Baltimore & Ohio Railroad Co., 104 I. C. C. 717 (1925).

There are numerous additional decisions where the Commission in recognition of the carriers' obligation to perform spotting services under the line-haul rates, approved or directed allowances to large industries for so doing. Surprising as it may seem, the allowances at the plants of two of the Appellees are now being paid under alternative orders of the Commission. *Pittsburgh Plate Glass Co. v. Director General*, 58 I. C. C. 81; *Allegheny Steel Co. v. Director General*, 60 I. C. C. 575. In both instances, the appellees complained of discrimination and the Commission ordered the defendant carriers either to grant spotting allowances to them or cancel similar allowances paid to other plants, their competitors. The Commission now finds these very allowances which it prescribed, to be unlawful.

In *National Malleable Castings Company v. P. & L. E. R. R. Company*, 51 I. C. C. 537, 541, no less than *twenty-four* previous cases are cited by the Commission, wherein it had:

> "• • • fixed reasonable allowances for switching to and from the tracks of the line-haul carriers performed by the industry itself either directly or through a common-carrier industrial line and in many instances the character of the switching was similar to that performed by the present complainant."

The report states, page 538:

> "The services performed by complainant consisted of switching cars from defendants' interchange tracks, *weighing, classifying, and spotting once for loading or unloading* at convenient places within the plant property, and reversing the movement with outbound cars."
>
> * * * * * * *
>
> "It has been the practice of the carriers at Sharon and in the surrounding iron and steel industrial region, to perform the services of spotting cars at convenient places within the inclosures of practically all of the iron and steel manufacturing plants which do not operate private engines, without charge therefor in addition to the line-haul rates, and to absorb out of the line-haul rates the charges of separately incorporated industrial railroads for interchange switching. *Car Spotting Charges, supra.* At most of the Sharon plants the carriers have performed services substantially similar to those performed by complainant at its plant."

See also *Allowance for Terminal Switching at Dekalb, Illinois*, 165 I. C. C. 27.

In reliance on this chain of decisions of the Commission, industries were built and developed. Until the institution of the present proceeding there was no thought on the part of either carriers or shippers that the doctrine which the Commission had repudiated and referred to as "revolutionary" in 1915 could have any place in our rate structure.

Then came the astounding decision of the Commission in the cases at bar, followed, it now appears, by another change of heart, as is evidenced by the views of the Commission in "Pick Up and Delivery in Official Territory" (Decided October 13, 1936, 218 I. C. C. 441) where the Commission, in apparent disregard of the principle it attempted to lay down in the cases at bar—that the service under the line-haul rates ended at the point of interchange—approved the practice whereby the carriers under their regular line-haul rates now pick up and deliver less carload freight at the customer's door, which is not even connected with the rails of the carrier, or grant allowances to shippers for performing this pick up and delivery service.

Testimony of the Witnesses.

The affirmative and unqualified testimony in this proceeding of numerous witnesses establishes that for many years it has been the universal custom and practice of the railroads of the United States east of the Mississippi and north of the Ohio and Potomac (including those involved in these appeals) to include all spotting services in their established freight rates. As illustrative of such testimony see the following:

J. L. Eysmans, Vice President, Pennsylvania Railroad Company. (R. 453-4)

J. R. Downes, Chief of Freight Transportation, *ibid.* (R. 339, 497)

D. F. Stevens, General Superintendent of Transportation, Baltimore & Ohio Railroad Company. (R. 500)

Samuel House, Freight Traffic Manager, *ibid.* (R. 335)

Ira H. Hubbell, Assistant Traffic Manager, New York Central Lines. (R. 293, 295)

E. B. Moffatt, General Superintendent, Delaware, Lackawanna & Western Railroad Company. (R. 261)

Jasper N. Haines, General Manager, Lehigh Valley Railroad Company. (R. 281, 285)

M. V. Bechstedt, General Freight Agent, Delaware & Hudson Corporation. (R. 254)

J. L. O'Toole, Assistant to General Manager, Pittsburgh and Lake Erie Railroad Company. (R. 330)

F. T. Sladden, General Freight Agent, *ibid.* (R. 319)

Henry W. Beyers, Vice President, Chicago & Northwestern Railway Company. (R. 347)

C. E. Johnston, President, Kansas City Southern Railway Company. (R. 426)

W. N. Deramus, General Manager, *ibid.* (R. 416)

T. H. Meeks, Assistant General Manager, Texas and New Orleans Railroad Company. (R. 402)

F. A. Key, Jr., Traffic Manager, Louisiana & Arkansas Railway. (R. 399)

Robert N. Nash, Freight Traffic Manager, St. Louis-San Francisco Railway Company. (R. 394)

B. F. Parsons, General Freight Agent, Chicago Great Western Railway Company. • (Orig. Tr. 4553)

Louis C. Bihler, Traffic Manager, Carnegie Steel Company. (R. 489)

We direct the Court's attention to the testimony of two representative witnesses.

• "Orig. Tr." as used in this brief has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586)

Mr. Julien L. Eysmans, Vice President in charge of traffic of the Pennsylvania Railroad, and one of the senior traffic officials of the country, expressed in the course of his examination his complete concurrence in the statement of the Commission in the *Car Spotting Charges Case, supra*:

> "As existing rates must be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant, to now add a charge to the line-haul rate for that service would be revolutionary." (R. 454)

Mr. Eysmans' testimony on succeeding pages of the record is most illuminating and clearly indicates the error of the decision subsequently entered by the Commission in these proceedings.

Another witness, perhaps the dean of the traffic men employed by industries, who testified in these proceedings, was Louis C. Bihler, traffic manager of the Carnegie Steel Company. His testimony was given as the result of continuous transportation and traffic service first with the railroads and later with industries, dating back to May, 1883 (R. 489). He too expressed his emphatic agreement with the statements and conclusions of the Commission in the *Car Spotting Charges Case*, last above quoted. Mr. Bihler testified (R. 490).

> "The Commission having found that the freight rates included the service of placement for loading and unloading, the railroads continued their practice the same as they had been doing many years before, and in addition, where the industry provided

an instrumentality of transportation, and performed part of the terminal service or spotting for account of the carrier, the industry made arrangements with the carriers for compensation based on cost, figured by the railroads themselves, through a Committee of Accounting Officers, carefully analyzing the cost of the industry's engine service based upon the records of the year 1916. As I recall it, this plant facility allowance authorized under Section 15 of the Interstate Commerce Act became effective about the year 1917. Tariffs were published by the carriers and filed with the Commission covering these allowances. In most cases, the tariff specified the allowance to be the actual cost, but not beyond a certain maximum.

"Since 1915 both the railroads and shippers treated the rates then published and those published thereafter as including the performance by the carrier of this service of placing cars for loading and unloading at convenient points in plant of the industry.

"It has been customary for our traffic department to furnish freight rates to our purchasing officers and to our sales department, and invariably and in all cases, such rates have been quoted to our other officers without any strings tied thereto; in other words, these officers always understood clearly that the freight rates always included the service of placement for loading or unloading according to whether the material was outbound or inbound. If freight rates were limited to line-haul service and other charges were to be added, we certainly would have raised a question as to the reasonableness of such application. To our minds and to the minds of all shippers, the question always was 'Is this rate a reasonable one, not only to cover the line-haul

but to cover the terminal service of the carrier at points of loading and unloading as well?' It is, of course, understood that our rates are made on a group basis, and these group rates have always included spotting service."

In addition to no less than 562 particular individual industries which were covered by comprehensive testimony in the investigation and which are served by so-called systems of side tracks, several thousand other industries are referred to in the Record as served by systems of side tracks on all of which the carriers spot the cars. The testimony before the Commission can leave no possible doubt as to the uniform custom under which the carriers have performed the spotting service under the compensation afforded by the regular freight rates, or have borne the cost thereof through the medium of allowances, or have stood ready and willing to perform such service where the industry for its own reasons preferred to spot the cars at its own expense.

C. THE CARRIER IS OBLIGATED TO FURNISH THE TRANSPORTATION SERVICE INCLUDED IN THE RATE.

On several occasions this Court has called attention to the obligation of the carrier to perform a transportation service included in the rate, the sole question being whether or not the service is so included.

The case of *Mitchell Coal Co. v. Penn. R. R. Co.*, 230 U. S. 247; 57 L. ed. 1472 (1913), should be very persuasive on the question now under consideration. That case holds specifically that where the tariffs do not specify the precise point at which goods will be received for transportation for the tariff rate, that point will be made certain by the practice followed by the carrier; and

that the carrier might lawfully make an allowance to shipper for transporting the goods from such point made definite and certain by the custom and practice of the carrier to the point where carrier chose to actually receive the goods.

The Mitchell Coal Company brought suit against the Pennsylvania Railroad for damages alleged to have been occasioned by the payment by the railroad of rebates to the Altoona and several other Coal Companies. It was alleged that the Mitchell Company was in competition with the other companies in shipping coal and coke over the Pennsylvania Railroad from the Clearfield district to the same general markets; and that the carrier paid to the other Coal Companies rebates, pretending that the money was given them as allowances for transportation service rendered by them in hauling cars over spur tracks between their mines and the railroad station. (230 U. S. 249; 57 L. ed. 1473).

In the Clearfield district there were many mines, some near the railroad and others at considerable distances therefrom but reached by lateral lines or spur tracks over which cars were carried to and from the mines. This Clearfield district was treated as a single shipping station and the rates from all points therein were the same where coal was transported to the same point beyond the state. The published tariff named the rate from station to destination but it was uniformly understood to include the haul from the mines. (230 U. S. 251, 252; 57 L. ed. 1474).

The other Coal Companies hauled coal from their mines to the station. The railroad paid them an allowance for that service but refused to make the same arrangement with the Mitchell Company. (230 U. S. 252; 57 L. ed. 1474).

The court said (p. 263 U. S.; 1479 L. ed):

"To pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot. The plaintiff insists that such is the case here, and that, as the tariff named the rate from the station, it could not lawfully include the haul from the mine, and consequently paying the shippers for doing their own hauling was a mere rebate.

"Such undoubtedly it would have been if naming the rate from station to destination meant that the haul had to begin at the depot building. But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield district was treated as a single shipping point, and where the rate, though named and published as from the station, was universally applied from the mines of the Mitchell Company as well as the other companies named in the declaration and all others located in the Clearfield district.

"Inasmuch as this rate included the haul the Railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the coal com-

panies to render that service, paying them proper compensation therefor."

Another case in point is *Chesapeake & Ohio Ry. Company v. Westinghouse, Church, Kerr & Company,* 270 U. S. 260, 70 L. ed. 576 (1926), where it was held that a carrier cannot, in view of the provisions of the Interstate Commerce Act, recover extra compensation for spotting service covered by the line-haul tariff, even though the consignee had contracted to pay such extra charge. Mr. Justice Brandeis, speaking for the court (p. 265 U. S.; 577 L. ed.) said:

> *"The service of spotting cars was included in the linehaul charge under both interstate and state tariffs.* The railway contends that under the tariffs no obligation rested upon the carrier either to furnish spotting service solely for the convenience of a shipper or to furnish him special facilities to meet abnormal and unprecedented conditions; that the contract was, therefore, not without consideration; and that, being for rental of equipment, it was not for a common carrier service and, hence, a contract therefore was legal under the Interstate Commerce Act, although no tariff provided for the charges. The service by special engine and crew contracted for and given was not spotting solely for the convenience of the shipper. *It was the spotting service covered by the tariff.* Compare Re Car Spotting Charges, 34 Inters. Co. Rep. 609; Downey Shipbuilding Corp. v. Staten Island Rapid Transit R. Co., 60 Inters. Com. Rep. 543. *It is true that abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking com-*

pensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the Interstate Commerce Act, Act of February 4, 1887. Chap. 104, sec. 6 (7), 24 Stat. at L. 379, 381, Comp. Stat. sec. 8569, 4 Fed. Stat. Anno. 2d ed. p. 406, as amended. A contract to pay this additional amount is both without consideration and illegal." (Italics ours).

In *United States v. Baltimore & Ohio Railroad Company*, 231 U. S. 274, 293, 58 L. Ed. 218, 227 (1913), this Court expressed the opinion that—

"• • • if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street Station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed. Wight v. United States, 167 U. S. 512, 42 L. Ed. 258, 17 Sup. Ct. Rep. 822; General Electric Co. v. New York C. & H. R. R. Co., 14 Inters. Com. Rep. 237; Interstate Commerce Commission v. Diffenbaugh, 222 U. S. 42, 46, 56 L. Ed. 83, 87, 32 Sup. Ct. Rep. 22."

D. IF THE SPOTTING SERVICE WERE NOT INCLUDED IN THE PUBLISHED FREIGHT RATES, THE CARRIERS' TARIFFS WERE REQUIRED TO SO SPECIFY.

The carriers in these cases duly filed and published tariffs specifying station to station rates and under such tariffs the carriers either performed the spotting service at Appellee's plants or duly filed local freight tariffs covering terminal allowances to the industries for performing such services.

Section 6(1) of the Interstate Commerce Act requires carriers to file with the Commission and print and keep open to inspection schedules showing, among other things, "separately all terminal charges • • • and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates." If the terminal service in these cases was not included in the published rates, the carriers were required to specifically exclude it in their tariffs. *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105, 54 L. Ed. 112, 114 (1909) where this Court said:

> "The carrier is under no obligations to charge for terminal services. Business interests may justify it in waiving any such charge, and it will be considered to have waived it unless it makes plain to both shipper and Commission that it is insisting upon it."

There is no evidence in the Record of any provision in the tariffs of the carriers involved for a separate terminal charge covering the spotting services at Appellee's plants or at any other industry.

E. THE EXTRAORDINARY CIRCUMSTANCES WHICH WILL RELIEVE THE CARRIERS OF THIS DUTY ARE NOT HERE PRESENT.

It is well recognized that the formula for which we contend is not inflexible. Certain extraordinary circumstances may relieve or limit the ordinary obligation of the carrier to perform the spotting service, but no such circumstances are present in these cases.

Most of the circumstances which give rise to such limitations have their origin in the rule of contract law that if a person (the carrier) contracts to do a specific thing (spotting) and the other party (the industry) throws obstacles in the way and makes it unreasonably difficult for the promissor (the carrier) to perform, the law excuses the promissor (the carrier) from performing his obligation. Typical of such circumstances are: (a) where the industry refuses to permit the carrier's locomotives to enter in and upon the private industrial tracks for the purpose of performing the spotting service; or (b) where the physical condition of the private industrial tracks—due to lack of adequate maintenance, excessive curvatures, light weight of rail or other obstacles—will not reasonably accommodate the carrier's power without hazard or excessive delay.

Appellants lay great emphasis upon the decision of the Commission in *General Electric Company v. N. Y. C. & H. R. R. R. Co.*, 14 I. C. C. 237 (1908), and that of the New York Court of Appeals in *New York Central, etc. Railroad v. General Electric Company*, 219 N. Y. 227, 114 N. E. 115 (1916), involving the same factual situation. These decisions were made with reference to exceptional circumstances, and are readily distinguishable

from the cases in hand. *There the General Electric Company was unwilling to permit the Railroad Company to perform the spotting service,* and we wholeheartedly agree that under such circumstances an industry is not entitled to an allowance from a carrier. The duty to perform the service is upon the carrier, and the carrier, in the exercise of its discretion, may elect to employ the industry as its agent to perform the spotting service, always reserving the right, of course, to cancel its tariffs covering the allowance and to perform the service itself. This was the point on which the Commission's decision in the *General Electric Case* actually turned, as appears from its statement in *Car Spotting Charges,* 34 I. C. C. 609 (1915), where in distinguishing the *General Electric Case,* the Commission said:

> "In *General Electric Co. v. N. Y. C. & H. R. R. Co.,* 14 I. C. C. 237, we stated that common carriers could not be called upon as a part of their contract of transportation to make deliveries through a network of interior switching tracks constructed as plant facilities to meet the necessities of the industry, but the case did not require a decision of that question. The point actually decided was that the complainant was not entitled to an allowance from the carrier for a service which the carrier was ready and willing to perform, and which the complainant performed because it was not convenient for it to permit the carrier to perform the service."

To the extent that the general language of the Commission in the *General Electric Case* casts a doubt upon the obligation of the carriers, under their published rates, to perform spotting service at ordinary large industrial plants, such doubt is effectively dispelled by the

subsequent decision of the Commission in *Car Spotting Charges* wherein the whole matter was thoroughly investigated, and by an additional twenty years of settled practice of both shippers and carriers in the interpretation of rates in accordance with the decision in the *Car Spotting Charges Case.*

The *General Electric Case* was exceptional in other particulars, which are pointed out by Mr. Justice Cardozo, speaking for the Court of Appeals of New York, in *New York Cent. & H. R. R. Co. v. General Electric Co., supra.* There the General Electric Company plant covered 180 acres, contained 140 buildings, which were connected by an extremely intricate system of interlacing tracks, used chiefly or exclusively as industrial facilities and over which the plant locomotives operated in the daily intramural movements essential in distributing materials and product to particular buildings for use in industrial processes. The Court regarded the elaborate system of operations which were essential to spot cars within such a plant as exceeding those standards for terminal services which custom had established. Justice Cardozo said:

> "We come back then to the test, which, vague as it is, remains the only safe one and we ask ourselves whether in the light of all the circumstances such a form of delivery is customary or reasonable."

And he concluded:

> "The defendant's (General Electric Company) standard of delivery does not conform, therefore, to the standard of custom."

On the contrary, in the present cases, the overwhelming and undisputed testimony establishes the custom

of the carriers to spot cars at plants such as those here involved. That custom has become even more firmly embedded in the rate structure since it was fortified by the decision of the Commission in the Car Spotting Charges Case.

The spotting service here involved is comparable, not to that of the *General Electric Case,* but to that done on public team tracks and private sidings. *According to the uncontradicted testimony of numerous witnesses, the cost per car incident to the spotting of cars on industrial plant tracks of the character here involved is less than the average cost of placing such cars on team tracks and private sidings.* See testimony of the following witnesses:

William J. Jones, Carnegie Steel Company. (R. 480)

V. W. Delaney, Youngstown Sheet & Tube Company. (R. 477)

J. L. Eysmans, Vice President, Pennsylvania Railroad Company. (R. 464)

J. F. Downes, Superintendent of Freight Transportation, *ibid.* (Orig. Tr. 2096, 11217)

H. R. Adams, Assistant General Manager, Erie Railroad Company. (R. 271)

Jasper N. Haines, General Manager, Lehigh Valley Railroad Company. (R. 283)

David B. Fleming, Assistant General Manager, New York Central Lines. (R. 301)

H. M. Eicholtz, Assistant General Manager, Chicago & Northwestern Railway. (R. 371)

J. F. Lord, Assistant to General Manager, Chicago and Eastern Illinois Railway. (R. 354)

D. S. Farley, Assistant to General Manager, Atchison, Topeka & Santa Fe Railway Company. (R. 356)

W. J. O'Brien, General Manager, Chicago River and Indiana Railroad. (R. 437)

L. R. Custer, General Manager, Bethlehem Steel Company. *(Orig. Tr. 9838)

W. J. Hammond, Traffic Manager, Inland Steel Company. *(Orig. Tr. 7638-9)

Hence we are here dealing with spotting as a mere substituted service, taking the place of ordinary team track delivery, and costing the carriers no more than the service in lieu of which it is given. Under these circumstances an additional charge cannot be made by the carrier. See *Interstate Commerce Commission v. Atchison, Topeka and S. F. R. Co.*, 234 U. S. 294, 58 L. ed. 1319, 1329 (1913).

Like the *General Electric Case*, each of the other decisions of the Commission upon which the defendants rely has relation to a special set of facts. There are only two cases where the question of spotting was examined as a whole in its broad aspects,—the Car Spotting Charges Case and this case.

F. THE FINDINGS AND CONCLUSIONS OF THE COURT BELOW SHOULD BE SUSTAINED.

The statutory court in setting aside the orders of the Commission in these cases, entered findings of fact 3, 4, 5 and 6 quoted on page three of this Brief, and the Court below similarly (R. 573) entered the following conclusion of law:

"1. The placement of cars at reasonably convenient and accessible places for loading or unload-

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*"Orig. Tr." as used in this brief has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586)

ing within industrial plants, including those of plaintiffs, is a common carrier service to which shippers are entitled, and which the carriers are in duty bound to perform, and is a transportation service under the Interstate Commerce Act, particularly under paragraph (3), section 1, thereof. Certain extraordinary circumstances, not present in these cases, may relieve or limit this obligation."

In the light of the record and of the prior decisions of this Court, as well as those of the Commission itself, no other conclusion could reasonably have been reached.

III.

The Carriers Could Lawfully Employ Appellees to Perform the Spotting Service on the Carriers' Behalf and Pay Reasonable Compensation Therefor.

The Interstate Commerce Act expressly recognizes the propriety and indeed desirability of the employment of shippers by carriers to furnish facilities and perform services of transportation, where this is economical and in the interest of efficiency. This provision, found in paragraph (13) of section 15 of the Act, was incorporated on the recommendation of the Commission contained in its Annual Report to the Congress for the Year 1905, from which we quote the following:

> "*Terminal Roads, Elevator Charges and Private Cars.*
>
> "It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at

this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Morever, *there are many instances in which the service can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shipper himself.*

"We do think, however, that *the Commission should be empowered* in a case of this kind *to determine whether the allowance to the property owner is a just and reasonable compensation* for the service rendered *and to fix a limit* which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available." (Italics ours).

The language of paragraph (13) of section 15, enacted pursuant to the foregoing suggestion of the Commission, is as follows:

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force

and effect and be enforced in like manner as the orders above provided for under this section."

The foregoing statutory provision for allowances to shippers by carriers has been frequently approved by this Court.

In *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83 (1911), it was held that contracts made by various railroads for elevation expenses of grain at points of trans-shipment at rates not exceeding those fixed by the Commission as reasonable, did not amount to illegal discriminations or rebates when paid to owners of elevators on their own grain, although such owners performed services other than those paid for at the same time, to their own advantage. It was further held that the Act of 1906 contemplates payment of reasonable compensation by carriers for services rendered or facilities furnished by owners of property transported, *the only power of the Commission being to determine the maximum of such compensation.*

After quoting that part of section 15 above set forth, Mr. Justice Holmes, speaking for the Court, said (p. 45 U. S.; 87 L. ed.):

> "Thus Congress clearly recognized that services such as those rendered by Peavey & Company, were services in transportation, and were to be paid for notwithstanding the possibility that some advantage might be gained as a result."

Later in the opinion he pointed out (p. 46 U. S.; 87 L. ed.):

> "The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the act of Congress in terms contemplates that if the car-

rier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, chap. 309, sec. 12, 36 Stat. at L. 539, 553.)"

In *Mitchell Coal & Coke Company v. Pennsylvania Railroad Company,* 230 U. S. 247, 57 L. ed. 1472 (1913), this court held that by custom and practice the coal rates apply not merely from the established stations of the carrier, but uniformly included the hauls over spurs from the mines. The court said (page 263 U. S.; 1479 L. ed.):

> "Inasmuch as this rate included the haul, the railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose, or it could employ the coal companies to render that service, paying them proper compensation therefor."

Although the record before the Commission in these cases shows that the carriers not infrequently had refused to employ a certain industry to perform spotting services and to grant an allowance under Section 15 of the Act, there is no instance covered by the investigation where any of the carriers serving the plants of appellees, nor, in fact, where any of the carriers in Trunk Line and Official Classification territory were refusing to perform the spotting service themselves without additional charge, where it was reasonably possible to do so. Instances are referred to in the record where the carriers

had in former years refused to publish an allowance to an industry for performing spotting services, but had subsequently done so (or performed the spotting service), under the terms of formal decisions of the Commission, requiring either payment or performance by the carrier.

Sun Co. v. Director General, 68 I. C. C. 11 (1922) (see Orig. Tr.* 11257);

Florence Pipe Foundry & Machine Co. v. Pennsylvania R. R. Co., 188 I. C. C. 215 (1932) (see R. 457);

Riter-Conley Manufacturing Co. v. Director General, 58 I. C. C. 327 (1920) (see Orig. Tr.* 9788);

Standard Oil Company v. Director General, 59 I. C. C. 620 (1920) (see Orig. Tr.* 7332);

United Chemical & Organic Products Company v. Director General, 60 I. C. C. 523 (1921); 73 I. C. C. 100 (1922); 112 I. C. C. 687 (1926) (see Orig. Tr.* 7325).

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* "Orig. Tr." as used in this brief has reference to the original printed record of the Commission proceeding, introduced as an exhibit in the lower court, and brought here by stipulation of counsel. (R. 511, 586)

IV.

An Allowance to a Shipper When Provided in a Published Tariff of the Carrier Cannot Be Considered as a Rebate or to Violate Section 6 of the Interstate Commerce Act.

The specific ground on which the Commission condemns the allowances here in question is clearly erroneous. It has been demonstrated beyond dispute that the service is included in the established rates. Despite this fact the Commission finds in the Supplemental Reports (R. 51):

> "That by the payment of an allowance the respondent carriers * * * refund or remit a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of Section 6 (7) of the act."

We have quoted the provisions of Section 15 (13) of the Interstate Commerce Act providing for allowances to be paid to shippers for performing services or furnishing facilities of transportation. It is indisputable that such allowances, which are payable out of the freight charges and affect the total which the shipper pays and the carrier receives on movements of freight, must be plainly provided for in tariff schedules filed with the Commission. This is in accordance with Section 6 of the Act, which provides:

> "Sec. 6 (1). That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points

on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. * * * The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force; and shall also *state separately all terminal charges*, storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered* to the passenger, shipper, or consignee. * * * The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act." (Italics ours)

Paragraph (7) of Section 6, which is particularly referred to in the Commission's findings, reads as follows:

"(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed

and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified,* nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, *except such as are specified in such tariffs.*" (Italics ours).

In every one of these cases (as appears from the Bills of Complaint, answers filed and admissions read into the record (R. 516)), tariffs covering the allowances now condemned were regularly published by the carriers and filed with the Commission. Hence the payment of the allowances was *not in violation of paragraph (7) of Section 6, but in accordance therewith.* A violation would have resulted had the Railroads *failed* to pay the allowances as provided in their published tariffs.

The Commission and the Courts have uniformly held that the published tariffs of the Railroads are absolutely controlling in the matter of rates applied and charges exacted of shippers for all transportation services: *A. J. Poor Grain Co. v. C., B. & Q. Ry. Company,* 12 I. C. C. 418, 422 (1907); *Texas & Pacific Railway Co. v. Abilene Cotton Oil Company,* 204 U. S. 426, 51 L. ed. 553 (1907); *Davis v. Portland Seed Company,* 264 U. S. 403, 425, 68 L. ed. 762, 769 (1924); *Beaumont, Sour Lake & Western Ry. Co. v. Magnolia Provision Company,* 26 Fed. (2d) 72 (1928). In the case last cited the Fifth Circuit Court of Appeals said (p. 73):

"• • • The Supreme Court has held that a published tariff rate is to be treated as though it were a statute binding upon both the carrier and the shipper. *Penn R. R. Co. v. International Coal Co.,* 230 U. S. 184, 33 S. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915 A, 315."

It inevitably results that for a carrier to comply with its published tariff which "is to be treated as though it were a statute" cannot possibly be held to subject the carrier to the granting of a rebate in violation of Section 6 (7) of the Act, and such has been the uniform view of the Courts:

> *Peavey & Co. v. Union Pacific Ry. Company,* 176 Fed. 409, 422 (1910):
>
> "Again, the allowance here in question was not a rebate because it was not a concession from the published schedules, but an allowance in accordance with them."

See also

> *American Sugar Refining Co. v. Delaware, L. & W. R. Company,* 207 Fed. 733, 744 (1913).

No carrier seeks to avoid the payment of these allowances. No shipper complains of them. Only the Interstate Commerce Commission, acting of its own motion, assails them, and we have demonstrated how completely without foundation are its conclusions from the standpoint of law as well as fact. Conclusion of Law No. 3 of the court below (R. 573) correctly states:

> "3. Such an allowance to a shipper, when provided in a published tariff of the carrier, cannot be considered as a rebate or in violation of Section 6 of the Interstate Commerce Act."

V.

To Support a Cease and Desist Order by the Commission It Must Make the Necessary Quasi Jurisdictional Findings of Fact, That the Rate or Practice Complained of Was Unreasonable, Unjustly Preferential, Unduly Discriminatory or Otherwise Unlawful, or the Order Is Void. No Such Findings Were Made in These Cases.

Section 15 (1) of the *Interstate Commerce Act* provides:

> "(1) That *whenever, after full hearing, upon a complaint* made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, *the Commission shall be of opinion* that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be *unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial*, or otherwise in violation of any of the provisions of this Act, *the Commission is authorized* and empowered to *determine and prescribe* what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to

be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, *and to make an order* that the carrier or carriers shall *cease and desist from such violation* to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." (Italics ours).

As a condition precedent to a cease and desist order Section 15 (1) of the Interstate Commerce Act, quoted above, requires that the Commission must conclude that the practice "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act." This Court has not only insisted that such findings shall be made by the Commission but that they shall be clear and specific. The rule was thus announced in *United States v. Baltimore & Ohio Railroad Company,* 293 U. S. 454, 462; 79 L. ed. 587, 594, 595 (1935):

"The railroads contend that to support the order certain basic findings are essential; that these were not made; and that, hence, the order is void. This contention is in our opinion sound.

* * * * * * *

"In the *Florida Case* (*Florida v. United States,* 282 U. S. 194, 215, 75 L. ed. 291, 304) the legal dis-

tinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in *Beaumont, S. L. & W. R. Co. v. United States,* 282 U. S. 74, 86, 75 L. ed. 221, 229, 51 S. Ct. 1, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court, compare *Virginian R. Co. v. United States,* 272 U. S. 658, 675, 71 L. ed. 463, 472, 47 S. Ct. 222, is not fatal to the validity of the order. It is true that formal and precise findings are not required, under § 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' Compare *Manufacturers R. Co. v. United States,* 246 U. S. 457, 487, 62 L. ed. 831, 846, 38 S. Ct. 383. *Meeker v. Lehigh Valley R. Co.,* 236 U. S. 412, 428, 59 L. ed. 644, 656, 35 S. Ct. 328, Ann. Cas. 1916B, 691, P. U. R. 1915D, 1072. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But § 14 (1) does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity."

So also in *United States v. Chicago, M., St. P. & P. R. Company,* 294 U. S. 499, 504; 79 L. ed. 1023, 1028 (1935), this Court said:

"This court has held that an order of the Interstate Commerce Commission is void unless sup-

ported by findings of the basic or quasi-jurisdictional facts conditioning its power. *Florida v. United States,* 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119; *United States v. Baltimore & O. R. Co.,* January 7, 1935, 293 U. S. 454, ante, 587, 55 S. Ct. 268. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida v. United States,* 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119, supra. Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning."

See also

Atchison, Topeka & Santa Fe Railway Company v. United States of America, 295 U. S. 193, 79 L. ed. 1382 (1935).

Not all preferences are unlawful, but only such as create undue or unreasonable preference or prejudice. Nashville C. & St. L. Ry. v. State of Tennessee, 262 U. S. 318, 67 L. Ed. 999 (1923). The case of *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company,* 43 Fed. 37 (1890), is in point. The question before the court was whether the issue by a railroad company of party rate tickets, good for ten or more persons at 2¢ per mile, while charging for tickets for single persons at the rate of 3¢ per mile, was an undue or unreasonable preference or discrimination. The court held that it was not, and that the issue of the tickets was lawful. The decision contains a very broad and thorough discussion of what constitutes undue or unlawful preferences. This case was affirmed by this Court in *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company,* 145 U. S. 263, 36 L. Ed. 699 (1892). Again the court

gave a very thorough discussion of what discriminations are so undue or unreasonable as to come within the terms of the law. Both decisions emphasize how great is the number of cases involving some discrimination, but which are not *undue* or *unreasonable*. See also *Texas & Pacific Railway Company v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940 (1896).

The question as to what constitutes undue and unreasonable preferences and advantages, etc., arises under such a variety of circumstances and is so complex that it cannot be answered by any set of rules. *Interstate Commerce Commission v. Louisville & N. R. Company*, 73 Fed. 409, 419 (1896).

All that the Commission finds in the cases at bar is "that by the payment of an allowance the respondent carriers provide the means by which the industry enjoys *a preferential* service not accorded to shippers generally." What does this mean? The uncontradicted testimony of a vast number of witnesses was to the effect that the American rate structure includes the placement of the car at a convenient place for loading or unloading,* that in the case of industrial plants the cost of such service is less than the cost of similar service at ordinary team tracks, and that the allowances here in question are less than it would cost the Railroads themselves to perform the terminal services.

We challenge the Government to point to any evidence in the 12,500 pages of original printed record of testimony or in the vast number of exhibits, which

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* The uncontroverted testimony is further to the effect that it would be physically impossible to load or unload cars on the so-called interchange tracks, and hence these tracks could not be deemed convenient places for loading and unloading.

would sustain a finding by the Commission that the allowances here in question are "unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial." The Commission could not and did not so find. It only concluded that the industry "enjoys a preferential rate not accorded to shippers generally." This is not a finding that such preferential or prejudicial treatment as exists is "undue" as required by Section 15 of the Act before a cease and desist order may be entered.

The Appellants in their brief (page 36) refer to Exhibit No. 150 of the Pennsylvania Railroad, and other similar exhibits showing instances where the spotting service is performed exclusively by the Railroad, or in part by the Railroad, and where the service is performed by the industry with and without the granting of an allowance. Appellants rely upon these exhibits as disclosing a series of unlawful discriminations as between those industries where the service is not performed nor an allowance granted and the remainder of the industries cited. The Commission, however, does not find that any such preference was undue or unlawful or unreasonable. The fact is that there was no evidence whatever of record to show that those industries which were not receiving the service or the allowance had requested either of them and in the absence of such a request there can be no unlawful discrimination. For reasons of their own, many industries prefer to do their own spotting service and refuse to permit the carriers to enter upon their property, as was the case with General Electric Company, to which we have referred. The exhibits in question demonstrate conclusively that the *general* custom and practice at industries throughout the territory of the Pennsylvania Railroad and other railroads involved in this class of exhibits was for the

carrier to perform the spotting service or to grant an allowance to the industry for so doing.

Undue or unreasonable preference or advantage involves a comparison between competitors, and the Reports make no such comparison and fail to disclose the respects in which the allowances are "preferential".

In *Texas and Pacific R. Co. v. U. S.*, 289 U. S. 627, 648; 77 L. ed. 1410, 1427 (1933), it is said:

> "The classical case of discrimination in rates is presented where a single carrier serving two points approximately equidistant from a common origin on the carrier's line, exacts unequal rates for the two hauls. Not only is the prejudice obvious, but equally so the ability of the carrier to abate it by raising the rates to the point enjoying the lower rates, or decreasing those to the point subject to the higher charge * * *. The reason for the doctrine is that preference or prejudice can be found only by a comparison of two rates. If these are the rate of one carrier to Point A and that of another to Point B while a relationship of one to the other may be determined neither the first nor the second carrier alone can be held to have created the relation. Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination —must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made under sec. 3 an alternative must be afforded. The offender or offenders may abate the discrimination by rais-

ing one rate, lowering the other, or altering both. Compare *American Express Co. v. South Dakota,* 244 U. S. 617, 624; *United States v. Penna. R. Co.,* 266 U. S. 191; *Chicago, T. & L. R. Co. v. United States,* 270 U. S. 287, 292; *Minneapolis & St. L. R. Co. v. Peoria & Pekin U. R. Co.,* 270 U. S 580, 582. The situation must be such that the carrier or carriers if given an option have an actual alternative.

"The principle has been approved in decisions of this court with respect to practices, *Interstate Commerce Comm'n v. Diffenbaugh,* 222 U. S. 42; *Central Railroad of New Jersey v. United States,* 257 U. S. 247, and rates *East. Tenn. V. & Interstate Commerce Comm'n,* 181 U. S. 1; *Penn Refining Co. v. Western N. Y. & P. R. R. Co.,* 208 U. S. 208, 221."

In the case of *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company,* 43 Fed. 37 (1890), the court referring to the Interstate Commerce Act, said (p. 47):

"The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company or traffic, nor subject any particular person, company, or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or im-

pose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other and to the carrier."

To the same effect, see

East Tennessee V. & G. R. Co. v. Int. Com. Com., 181 U. S. 1; 45 L. ed. 719 (1901).
Cent. R. Co. of N. J. v. U. S., 257 U. S. 247; 66 L. ed. 217 (1921).

The Commission in these cases did not make any comparison between the rates or allowances given by the Pennsylvania Railroad and the other carriers serving the plants of appellees with the rates or allowances given by such carriers to any other shippers or consignees on their lines. There was no evidence in the record making such comparison. The tariffs of the carriers serving the plaintiff's plants assured to every industry located on their lines that cars shipped to such industry would be spotted for the single line-haul rate equally and without discrimination. There was no charge or evidence that these tariffs were not observed.

VI.

Reply to Brief for Appellants.

The brief of counsel for the United States and the Interstate Commerce Commission contains numerous statements which Appellees cannot accept as accurate and many unfounded contentions of fact and of law. It is unnecessary to burden the court with a detailed criticism of or rejoinder to Appellants' brief, but there are four features of Appellants' brief to which a brief reply seems appropriate:

FIRST: Woven through Appellants' entire discussion is the reiterated statement or implication that the spotting services, performed by the Pennsylvania Railroad at the Weirton plant or paid for by the railroads through the medium of the allowances at the other plants, are rendered "at the beck and call of the industries"; that the service performed is "standby service"; that the spotting service at these plants is done "when and as needed by the industry". This is pure assumption not supported by substantial testimony of record. It ignores the broad facts abundantly established by uncontroverted evidence and to which these particular industries afford no exception. The record shows that the allowances paid to Appellee industries cover only a fraction of the operating cost of the plant locomotives and crews who perform the work, that a large part of the engine time is devoted to services of the industry for which they are not compensated by the allowance, and that in each case the allowance was predicated upon careful application of a formula to a time and cost study made by the carriers at that industry. This formula, fully explained by numerous witnesses,* was adopted in conformity with the general conclusions of the Commission in the *Industrial Railways Cases*, notably 37 I. C. C. 408, and it expressly provides for the exclusion of all engine time devoted to plant service or beyond a point where substantial interference or interruption in performing the plant service may be encountered in determining the allowance. (R. 322; Rule 8, carriers' exhibit No. 106, vol. 2 of printed exhibits p. 300.)

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* Witnesses Glynn, Pennsylvania Railroad (R. 470); Morris, for Central Freight Asso. carriers (R. 445); Lawrence, for Eastern Trunk Lines (R. 505); Boyd (R. 439) and Vivian (R. 363), for Western Trunk Lines; Sladden, for Pittsburgh & Lake Erie Railroad, and many others.

When an industry witness describes the spotting service performed by its locomotives and states that the work is done at times convenient to the industry, there is no proper implication that this is laying a burden on the carrier, for in the fixation of the allowance paid for the doing of the work, the cost figure used was predicated on termination of the work where substantial interruption or interference may be encountered and the performance of the work according to usual railroad practice. The formula so provides and there is no room for doubt on the point.

SECOND. The implication in the Commission's original report, 209 I. C. C. 11, that anything is unlawful which is of mutual benefit and advantage both to the carrier and to the shipper finds expression all through Appellants' brief. This Court has frequently pointed out that this assumption is erroneous, notably in *United States v. Baltimore & Ohio R. Co.*, 237 U. S. 274, 58 L. ed. 218, and *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83. The court below was correct in its conclusion of law No. 4 (R. 573):

> "4. A practice of a carrier may not be condemned because of the fact that it is beneficial to the shipper as well as the carrier."

The erroneous thought of Appellants is that when the Pennsylvania Railroad employs the Allegheny Steel Company to perform for the carrier the terminal switching service at that plant, if the arrangement is of any advantage whatever to the steel company, it is necessarily unlawful by reason of that fact. Admittedly it is unlawful if the advantage is undue. If, as the result of employing the industry to do the spotting, the industry is thereby convenienced and the railroad

saved expense, the two facts would seem both to commend the arrangement.

In *Car Spotting Charges,* the Commission condemned the proposed charge for spotting of cars by the railroads in large industries with complicated systems of trackage. Suppose in such an industry expressly covered by that decision the movements of railroad engines would conflict with the movements of plant engines but the latter stand aside to avoid such conflict. Suppose further that the railroad decides that it will grant an allowance to that industry and let the industry engines do the work. As the result of the new arrangement conflict between plant engines doing plantwork and the same engines doing railroad work becomes impossible. Interruption and interference automatically disappear. Surely the law does not forbid that result which is economically advantageous to all parties.

THIRD. Counsel for Appellants blow hot and cold in their brief as to the general custom and practice of the carriers in respect of spotting services. They carefully avoid any references to the abundant testimony of the railway operating and traffic witnesses who, without exception, testified that at all plants, large and small, within the section of the United States here involved the carriers assume the obligation of placing the cars at points reasonably convenient and accessible for loading and unloading. Their only references to the record are to exhibits and oral testimony going to a point which, when correctly stated, is not disputed. There are many industries who do their own spotting work and who receive no allowances. It is expressly conceded and at all times has been recognized that the railroads are free to decide whether they will employ an industry and

make it an allowance or whether they will themselves perform the service.*

Appellants stress the alleged conditions in New England and in the southern states, where we concede allowances are not prevalent, and avoid much discussion of the situation in the central states where there are many industries receiving allowances, a large number of which were granted by the Commission in formal decisions. As to those industries doing their work without an allowance there is no evidence that the carrier denies the duty of placing the cars and would not perform the service if asked to do so.†

FOURTH. The description of the circumstances and conditions supposed to exist at these five industries and incorporated on pages 73 to 117 of the government brief is not a fair and correct description in accordance with the record. We pass by the many partial and misleading statements. For example, in discussing Allegheny Steel Company it is said that the railroad witness testified (R. 203) that "the power that the Pennsylvania has in this vicinity could not do the spotting at this plant because it is too large to take the curves." The witness in the very next sentence of the narrative on that page of the record went on to say "this railroad does have power that can do it but not in this vicinity." The record

* Subject, of course, to the rule that there must be no unjust discrimination in granting one shipper an allowance and under like circumstances denying an allowance to his competitor. See the Commission's decision in *Florence Pipe case*, decided September 30, 1932, 188 I. C. C. 215, and to the testimony of Vice President Eysmans with regard to that industry, given prior to the Commission's decision. (R. 457)

† A good illustration is the American Steel & Wire Company plant at Worcester, Massachusetts, which performs the spotting service without an allowance. The witnesses for the carrier serving the plant stated they would perform the spotting service, as a matter of course, if called upon to do so. (R. 250)

bearing specifically on the five industries now before the court is not voluminous *and covers no more pages of the printed record than the number of pages devoted thereto in Appellants' brief.* There are just five printed pages of narrative of the testimony concerning Allegheny Steel Company (R. 119 to 204) and if the court will read these pages it can readily determine for itself whether the evidence proves that the Allegheny Steel Company is receiving an allowance covering performance of work which is not transportation within the accepted and statutory definition. The outstanding fact in that testimony, totally ignored by counsel for Appellants, is the uncontradicted statement of the witness for the Pennsylvania Railroad that the amount of this allowance of $1.07 per car was ascertained on the railroad formula, which formula clearly provides for the exclusion of all engine time beyond any point where interruptions or interferences are encountered and for the exclusion of time beyond the scales where cars are weighed for convenience. (R. 204).

There are two citations in the brief for Appellants as to which comments may be appropriate.

On page 66 of their brief, Appellants cite the decision in *Koppers Gas & Coke Co. v. United States,* 11 F. Supp. 467, where they say "the sufficiency of the Commission's findings, which were identical to those in the cases at bar, was challenged". They do not mention that this decision was on application for a *preliminary* injunction and that the case subsequently has been submitted but is not yet decided on final hearing. The court expressly stated (470) that:

> "nothing which we have said in passing upon this application for a preliminary injunction is to be regarded as a determination upon its merits of any of the questions presented by the petition."

The language quoted in the government brief from the District Court's opinion is followed by these significant sentences which are not quoted:

> "While we do not desire to foreclose the petitioner from asserting, upon the final hearing, the insufficiency of the findings to sustain the order complained of, the doubts which we entertain as to the adequacy of the findings are not sufficient to justify the issuance of a preliminary injunction."

The court based its refusal of a temporary injunction upon the fact that the record of evidence before the Commission was not before the court and it could not, therefore, inquire as to the support for the Commission's findings. It pointed out that while section 14 of the Interstate Commerce Act had been amended to relieve the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½, yet there has not been removed the necessity of making *quasi* jurisdictional findings essential to the constitutional or statutory validity of orders subject to judicial review.

On page 67 of the brief for Appellants reference is made to the decision announced January 23, 1937 by a statutory court for the Northern District of Indiana in *Elgin Joliet & Eastern Ry. Co. v. United States,* and *East Chicago Dock Terminal Co. v. United States,* described as "not yet reported." Counsel for the Commission have furnished copies of the opinion in that case to other District Courts in which are pending cases to review like Commission orders, including the group of cases recently decided by the District Court at New Orleans. The opinion of the Court for the Northern District of Indiana makes the decision turn squarely on the peculiar facts of that case, and describes the plaintiff as receiving a

"stand-by" service quite distinguishable from the situation at Pittsburgh. After discussing the facts and quoting the decision in the present cases, the Court said:

> "We agree with Judge Schoonmaker and his associates in the case we have discussed in the statement that the applicable decided cases hold that the limits of place within which delivery is due will vary with varying conditions, and that such delivery is required as is customary and reasonable."

It is thus apparent that neither the *Koppers Gas and Coke Case* nor the *Elgin, Joliet & Eastern Ry. Co. Case* can possibly be regarded as adjudications applicable to the cases at bar.

VII.

Conclusion.

It is perfectly obvious that the real purpose and effect of the orders of the Commission in these cases is to increase freight rates by the imposition of additional charges for the performance of services which the Commission, the carriers and shippers alike have long regarded as included in the service under the line-haul rates. The same proposal was advanced by the railroads in 1914, thoroughly investigated, branded as "revolutionary" and condemned by the Interstate Commerce Commission in 1915 in *Car Spotting Charges,* 34 I. C. C. 609, in an exhaustive opinion printed in the Appendix to this Brief. Similarly, intrastate rates in Pennsylvania have been established as including the spotting service since the opinion of the Public Service Commission of the Commonwealth of Pennsylvania in *National Tube Company et al. v. Baltimore & Ohio Rail-*

road Company et al. (1919), printed in the Appendix to this Brief.

The carriers themselves, whom the Commission seeks to benefit by its action, are in full accord with the views which we have expressed. We respectfully urge the Court to read the Brief of certain carriers, filed in this Court *amici curiae*. That Brief, with its abundant quotations from the Record, shows conclusively that the spotting service here involved is not in excess of team track or simple switching placement, that there is no such interruption or interference by the desires of the Appellees or the disabilities of their plants as to warrant the Commission in condemning the spotting services there performed, and that the payment of allowances of the character here involved is in conformity with efficient and economical management as contemplated by the Interstate Commerce Act.

Little wonder, in the state of the law and the record that in these very proceedings we find arrayed against the decision of the majority of the Commission the following:

(1) The Commission's own counsel in this investigation (Ex Parte 104, Part II, Terminal Services). See their memorandum served on counsel for the industries and filed with the Director of Service, printed in Appendix to this Brief, p. 16.

(2) All the railroads serving the territory where Appellees' plants are located, as evidenced by their brief filed in this Court, and by their Exceptions and Brief filed before the Commission.

(3) Commissioner Mahaffie of the Interstate Commerce Commission. (See his dissenting opinion, R. 43.)

(4) Judges Davis, Gibson and Schoonmaker, who composed the statutory Court which heard these cases below. See opinion (R. 531), findings of fact and conclusions of law (R. 571) and decrees (R. 574-577).

(5) Judges Foster, Borah and Kennerly, who composed a statutory Court in the Fifth Circuit, which set aside the orders of the Interstate Commerce Commission in nine cases arising out of the same report of the Commission as is here involved (Opinion is printed in Appendix to Appellee's Brief, p. 3).

We respectfully submit that the decision of the Court below should be affirmed.

DAVID A. REED,
ARTHUR B. VAN BUSKIRK,
ROBERT L. KIRKPATRICK,
Counsel for Appellee,
American Sheet & Tin Plate Company,

LUTHER M. WALTER,
JOHN S. BURCHMORE,
Counsel for Appellees,
Allegheny Steel Company,
Pittsburgh Plate Glass Company,
Weirton Steel Company,
West Leechburg Steel Company.

WILLIAM W. COLLIN, JR.,
Of Counsel.